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Joint written statement* submitted by International-Lawyers.Org, the Arab Organization for Human Rights and the Union of Arab Jurists, non-governmental organizations in special consultative status, and International Educational Development, Inc. and the World Peace Council, non-governmental organizations on the roster

The Secretary-General has received the following written statement, which is hereby circulated in accordance with Economic and Social Council resolution 1996/31.

[5 February 2018]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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Holding the United States-Led Coalition that Invaded Iraq Responsible for the Crime of Aggression*

Focus

This statement focuses on the troubling lack of accountability for the crime of aggression committed through the invasion of the Republic of Iraq in March 2003 by the United States of America.[1] The failure to hold former government leaders accountable for this invasion is a grave threat to international law.

Background

In March 2003, the United States of America, under President George W. Bush, along with the United Kingdom of Great Britain and Northern Ireland and other coalition countries (collectively, the "***Coalition***"), invaded Iraq.[2] The United States and the Coalition failed to obtain United Nations Security Council approval to employ this use of force in Iraq. The Bush administration tried to justify the invasion with a theory of anticipatory self-defense, citing a belief that the Iraqi government was harboring weapons of mass destruction and suggesting Iraq was connected with the September 11th terrorist attacks.[3]

In January 2004, after the American military action had dismantled Iraqi state institutions associated with the Iraqi government, defeated the Iraqi army and other security forces, and killed thousands of Iraqi civilians, the Coalition abandoned this theory.[4] An official report submitted to President Bush by the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction concluded the Bush administration was wrong on these grounds, and that claims of weapons of mass destruction were unsubstantiated. Scholars retrospectively suggest that this "error" by President Bush was either evidence that Bush-era officials had reason to believe their claims were weak when the United States invaded Iraq, or, that they knowingly and intentionally invaded Iraq at all costs.[5] If the latter is true, this perpetuated a fraud on American citizens and more generally with the international community with respect to the legitimacy of the war itself.

In September 2005, United Nations Secretary-General Kofi Annan declared the United States-led war on Iraq "illegal" because the United States and the Coalition violated the United Nations Charter (the "***Charter***") when they invaded Iraq without the permission of the Security Council.[6]

International Law on the Prohibition of Aggression

During the 1946 Nuremberg Trials, the International Military Tribunal at Nuremberg (the "***Nuremberg Tribunal***") characterized wars of aggression as "the supreme international crime differing only from other war crimes in that it

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[1] This March marks the 15th year anniversary of the Iraq War.

[2] *The Iraq War: 2003- 2011*, Timeline, COUNCIL ON FOREIGN RELATIONS, https://www.cfr.org/timeline/iraq-war (last visited Jan. 20, 2018).

[3] HON. LAURENCE H. SILBERMAN AND HON. CHARLES S. ROBB, COMMISSION ON THE INTELLIGENCE CAPABILITIES OF THE UNITED STATES REGARDING WEAPONS OF MASS DESTRUCTION (Mar. 31, 2005), https://fas.org/irp/offdocs/wmd_report.pdf.

[4] *The Iraq War: 2003- 2011*.

[5] Ronald Kramer, *et al.*, *The Supreme International Crime: How the U.S. War in Iraq Threatens the Rule of Law*, 32(2) SOCIAL JUSTICE 52, 58 (2005).

[6] Ewen MacAskill & Julian Borger, *Iraq War Was Illegal and Breached UN Charter, Says Annan*, THE GUARDIAN (Sept. 15, 2004), https://www.theguardian.com/world/2004/sep/16/iraq.iraq.

contains within itself the accumulated evil of the whole."[7] This holding from the Nuremberg Tribunal was subsequently enshrined in the Charter. The Charter only permits acts of violence against another State committed in self-defense or with the explicit approval of the Security Council.[8] The prohibition of aggression contained in Article 2 of the Charter constitutes a *jus cogens* norm of international law, a norm from which no derogation is permitted and for which there is an obligation on all States to support and sustain.[9] Therefore, the prohibition of aggression applies to the United States, the United Kingdom, and every member of the Coalition, without exception.

The Invasion of Iraq Was Aggression under International Law

The Coalition committed the crime of aggression when they invaded Iraq in March 2003. Despite claims by American and/or British officials that they had approval from the Security Council to invade based on a 2002 Security Council resolution, which threatened Iraq with "serious consequences" if it refused to disarm,10 this was not enough. At no time had the Security Council identified the Iraqi government as a future or imminent threat to international peace, or otherwise authorized an invasion of Iraq.[11] The United States and the United Kingdom were aware of the need for a specific Security Council resolution authorizing the invasion and/or additional use of force, as evidenced by their attempt to pass a subsequent resolution, something they abandoned when it became clear that this additional resolution would be vetoed.12 Ignoring their duty to obtain Security Council approval, the United States and the Coalition invaded Iraq anyway, violating the Charter and breaching the *jus cogens* prohibition against aggression and crimes against peace.[13]

Lack of Accountability over the Iraq War

To date, there has only been one attempt to investigate the issue of aggression in Iraq. From 2013 through 2017, a private class of Iraqi civilians affected by the war sought to hold Bush-era officials accountable through the United States courts, ultimately lodging an appeal and arguing before the United States Court of Appeals for the Ninth Circuit, asking for permission to pursue a lawsuit based on a theory of aggression.[14] However, the Ninth Circuit held that former Bush-era officials were immune from further civil investigation based on the Westfall Act, a law that grants former government officials immunity for acts committed under the "legitimate" scope of their authority.[15] No other serious attempts to investigate the Iraq War and the issue of aggression have been made in the United States or elsewhere.

This lack of accountability sets a dangerous precedent. The illegal war in Iraq not only threatens the doctrine enshrined in the Charter but also erodes the foundation of a world order governed by the rule of law.

The Need for an Independent, International Criminal Court for Iraq

Since the domestic judicial mechanisms of the United States, other Coalition countries or the victim country (Iraq)16 may be ineffective in prosecuting or otherwise examining the issue of aggression, there is a need for an alternative and

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[7] *Nuremberg Trial Proceedings, Volume 22*, The Avalon Project: Document in Law, History and Diplomacy, YALE LAW SCHOOL: LILLIAN GOLDMAN LAW LIBRARY, http://avalon.law.yale.edu/imt/09-30-46.asp (last visited Jan. 21, 2018).

[8] U.N. Charter art. 2, ¶ 4; U.N. Charter art. 39.

[9] *See, e.g.*, *Barcelona Traction* case decided by the ICJ in 1970, holding that the "outlawing of acts of aggression" is obligation *erga omnes* owed to the entire international community. *Barcelona Traction (Belg. v. Spain)*, Judgement, 1970 I.C.J. 3 (Feb. 5), ¶ 34. *See also* G.A. Res. 2625 (XXV) annex (Oct. 24, 1970); G.A. Res. 3314 (XXIX) annex (Dec. 14, 1974).

[10] Security Council Res. 1441 (Nov. 8, 2002).

[11] U.N. Charter art. 39; U.N. Charter art. 44.

[12] *France, Russia Threaten War Veto*, CNN (Mar. 10, 2003), http://www.cnn.com/2003/WORLD/europe/03/10/sprj.irq.france.chirac/ (last visited Jan. 28, 2018).

[13] Guardian Staff, *Chilcot Report: Key Points from the Iraq Inquiry*, THE GUARDIAN (July 6, 2016), https://www.theguardian.com/uk-news/2016/jul/06/iraq-inquiry-key-points-from-the-chilcot-report.

[14] *Saleh v. Bush*, 848 F.3d 880 (9th Cir. 2017).

[15] *See generally* 28 U.S.C.A. §2679.

[16] While the United States formally "left" Iraq in 2011, it continues to dominate Iraqi political affairs through the present.

international judicial platform.

Initially prosecuted on an international level before the Nuremberg Tribunal, the crime of aggression is the supreme international crime. Starting on July 17, 2018, the International Criminal Court (ICC) can narrowly prosecute crimes of aggression, making it the first time since the Nuremberg Tribunal that an international court will be able to prosecute this crime.[17] The ICC's jurisdiction, however, is very narrow and does not apply retroactively. Therefore, the ICC does not have jurisdiction over the crime of aggression committed at the beginning of the Iraq War. Regardless of the lack of jurisdiction over the crime of aggression, the United States would use its veto power to prevent any Security Council-initiated referral in this case. For these reasons, the international community needs a separate independent tribunal to prosecute United States and Coalition officials for aggression.

Like previous international criminal tribunals, an independent international criminal tribunal for the crimes committed in the lead up to the Iraq War will further the cause of justice, enforce and uphold the rule of law, and further international accountability. It will set precedent that no member State can violate the Charter without consequences. Absent such a tribunal, the international rule of law will wither, leading to anarchy and chaos, and ultimately destroying global peace and security.

Recommendations

- The Human Rights Council should urgently endorse an international independent investigation, and in particular, an international tribunal to look into allegations that the United States and the Coalition committed the crime of aggression when they invaded Iraq;
- The Human Rights Council should urgently seek the assistance of independent legal experts and judges who can advise on the creation of an independent tribunal with respect to the crime of aggression committed against Iraq;
- The United Nations should condemn crimes of aggression by member states, including the one committed by the United States and the Coalition when they invaded Iraq.

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*Geneva International Centre for Justice (GICJ), The Arab Lawyers Association- UK, The Brussells Tribunal, Association of Humanitarian Lawyers (AHL), The Iraqi Commission for Human Rights (ICHR), Association of Human Rights Defenders in Iraq (AHRD), General Federation of Iraqi Women (GFIW), Organisation for Justice & Democracy in Iraq (OJDI), The Iraqi Centre for Human Rights, International Anti-Occupation Network (IAON), NGOs without consultative status, also share the views expressed in this statement.

[17] Alex Whiting, *Crime of Aggression Activated at the ICC: Does It Matter*, JUSTSECURITY (Dec. 19, 2017), https://www.justsecurity.org/49859/crime-aggression-activated-icc-matter/.